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THE STUDY OF THE LAW.

THE present paper has for its purpose a statement, in general terms, of the different points of view from which law may be studied in order to determine its nature and purposes.

PRACTICAL JURISPRUDENCE.

It is possible to view the laws of a given country as an aggregate of detached rules, as a sum of particular definitions and separate statutory and judicial declarations, a knowledge of which may be obtained by a mere exercise of the memory. Such a memorized knowledge of legal definitions and precepts is, unfortunately, deemed adequate, in not a few of our States, for admission to the bar. In fact, however, a knowledge of these definitions and substantive legal declarations is without any real meaning to anyone until the reasoning by which they have been supported has been understood, until the principles themselves have been brought into relation to one another, and the logical ligaments which unite them determined, and thus a systematic whole created.

Such a systematized knowledge of the law as this may properly receive the title Practical Jurisprudence. Its aim, while higher than that of a mere memorized knowledge of the substantive precepts of the law, does not, however, advance beyond a practical working knowledge of the law. There is not necessarily involved an effort to penetrate beneath the rules of the law in order to discover the abstract concepts and principles which are implicit in the propositions which they declare.

When this is done, the field of Analytical Jurisprudence is entered. Here the aim is not so much the determination and ordered statement of the substantive principles of the law as it is a clear comprehension of the ideas implied in the definitions and distinctions which the law employs. Analytical Jurisprudence is thus essentially, if not wholly [1] a formal science. Holland described it as dealing "rather with the various relations which are regulated by legal rules than with the rules themselves which regulate these relations."

Some writers distinguish between general and particular Analytical Jurisprudence. Thus Austin says:

> "Considered as a whole, and as implicated or connected with one another, the positive laws and rules of a particular and specified community, are a system or body of law. And as limited to any one such system, or to any of its component parts, jurisprudence is particular or national. * * * The proper subject of general or universal jurisprudence is a description of such subjects and ends of law as are common to all systems, and of these resemblances between different systems which are bottomed in the common nature of man, or correspond to the resembling points in these several portions."

Of these common general principles, Austin goes on to declare, some are necessarily present in all systems of law, among which are the concepts of duty, right, liberty, injury, punishment and redress, together with their relations to one another, and to law, sovereignty and political society.

The value of analytical jurisprudence, whether general or particular, consists in the fact that only with its aid is it possible to reduce a body of legal principles to a systematic and scientific whole. Until the exact connotations of the terms employed have been accurately ascertained, the significance of a definition, however formally precise, cannot be perceived; and until these definitions have been mastered they cannot be intelligently employed for purposes of systematization. It is because of the absence of this preliminary analytical work that the COMMEN-

[1] See GRAY, NATURE AND SOURCES OF LAW.

TARIES of Blackstone, otherwise so excellent, abound in false distinctions and absurd classifications. It is due to the same defect that so many of the legal text-books of today are nearly worthless, being almost useless to the student, and of value to the practitioner only as a means of ready reference to reported cases. It may also be said that not until, by means of analytical jurisprudence, the fundamental concepts of our law have been determined, can its codification be wisely attempted, and this is as true of the attempted codification of a single branch of the law as it is of the whole body of the law.

It is possibly necessary to say that this formal analytical theory has no relation to that "artificial reason" of the law of which Coke spoke in his famous reply to King James, and which, as employed today, tends to bind the substance of our law within the straight-jacket of conceptions of social justice and public policy which have long since ceased to be held. The analytical jurisprudence of which I have been speaking seeks a scientific knowledge of the law, and not a formal consistency of its precepts with assumptions without inherent or absolute validity, but accepted and developed by the courts in response to social requirements which, if they ever truly existed, no longer obtain.

In the universities of England, since the time of Bentham and Austin, the study of analytical jurisprudence is emphasized and the legal literature of the country is enriched by such works as those of Amos, Holland, Lightwood, Markby, Pollock and Clark, not to mention the works of the Australians, Salmond and Jethro Brown. These works are employed as prolegomena to the professional and technical study of the law. It is, however, to be observed that in very many cases those men who take the law courses at Oxford and Cambridge do not expect to become lawyers, and a large proportion of those who do expect to enter the bar take the mathematical, classical, philosophical and historical courses while at the university, and study their law after they have graduated. In Europe, as is to be expected, where the study of the law is so exclusively carried on within university halls, the abstract, or analytical, aspects of the law receive attention. The introductory treatises which are employed, do not, however, exactly correspond to those employed

in the English universities. In their Institutes, Pandects and so-called Encyclopedia, the student, in the first year of his work, is given an idea not only of the concepts employed in judicial thinking but a knowledge of the general substantive principles themselves—principles the specialized application of which he is to consider in the remainder of his university course.

An *Encyclopedia* of law is defined by Arndt as "a scientific and systematic outline or general view of the whole province of jurisprudence, together with the data of that science; its purpose is to determine the compass and limits of jurisprudence, its relations to other sciences, its internal divisions, and the mutual relations of its constituent parts." [2] An example of this type of juristic literature is seen in Gareis' *Encycklopädie und Methodologie der Rechtswissenschaft* which has recently been translated into English under the title *Introduction to the Science of Law.*

It would seem that, logically, a mastery of analytical jurisprudence should precede the attempt to learn the substantive principles of the law—that the concepts of legal thinking must be known before its contents can be understood. There is, however, considerable ground for holding that, pedagogically, the study of analytical jurisprudence, except in an elementary manner, cannot be successfully prosecuted until the student has obtained a working knowledge of the substantive principles of the law and thus has in hand the material to which the analytical principles may be applied. The continental method, according to which the student, in his first year, is introduced to only the most general of legal concepts, and is then given a general knowledge of the precepts of the law, is certainly a wise one; especially when to this general legal knowledge are united courses in economics, political science, history and philosophy, which enable the student to view the law as a science in its proper setting with relation to the other humanistic and normative branches of human knowledge.

Comparative Jurisprudence.

Comparative jurisprudence, as its name indicates, is based

[2] Quoted by Borchard, 12 Col. Law Rev. 305.

upon a study of two or more systems of law. From this study the aim is, by extending the sphere of investigation beyond the boundaries of a single community, to obtain a firmer inductive basis for the conclusions which one reaches. These conclusions may be in the field of what we have named general jurisprudence, or they may supply guidance in questions of legislative policy and thus fall within the province of what, since Bentham's day, has been called the science of legislation. It is to be observed, however, that, whatever its aim, comparative jurisprudence is a method of investigation rather than an independent juristic science.

The value of the comparative method when employed in the examination of any complex subject is obvious. Out of varieties of particular instances it is easier to arrive at an exact and comprehensive statement of essential characteristics, and guiding principles, than it is from an inspection of single isolated facts. Thus the more complex the subject dealt with, the more important this method becomes. In the legal field, this importance becomes especially manifest when the province of legislation is reached. Here, where the aim is to suggest the repeal or amendment of existing laws, or the enactment of new ones, a study of the experience of other communities becomes practically indispensable. In the United States the opportunities for the use of this method are especially abundant. With forty-eight bodies-politic, practically independent of one another so far as concerns the regulation of all but a few matters, the comparative method is accepted both by the courts and the legislatures as almost a matter of course. The *dicta* of judges of the sister commonwealths are confidently cited by counsel and judges in their several courts, and statutes successfully operated in one State are copied by the law-making bodies of the other jurisdictions.

Historical Jurisprudence.

A branch of legal study distinct from those thus far considered is that of historical jurisprudence. Analytical jurisprudence, whether particular or general, and whether pursuing the singular or comparative method, is concerned with the law

as it is. Historical jurisprudence answers the question how it has come to be. The aim of the student of historical jurisprudence is to discover the origin and to trace the development of the abstract judicial ideas that have found, and still find, their expression in the legal thought of a people. With the exact forms in which, at different times, these abstract conceptions may have found statement, or with the particular applications to which they may have been put, he is not concerned. His whole interest is with the underlying notions of the law. Holland has correctly declared the aim of jurisprudence to be the setting forth of "these comparatively few and simple ideas which underly the infinite variety of legal rules," that "jurisprudence deals rather with the various relations which are regulated by legal rules than with the rules themselves which regulate those relations." This being the aim and method of jurisprudence, historical jurisprudence must have for its province the tracing of the development of these abstract legal conceptions. Thus, to illustrate, the student of historical jurisprudence has first of all to discover and state the probable form in which the very idea of law first framed itself in the human mind, what theories were held as to its source, its sanction, its relation to religious dogma and to political command; next to learn how, through successive steps, the exact notion of a positive *jus civile* separated itself from the religious and ethical ideas with which it was at first associated. This done, the task is to take up, one after another, such elementary legal ideas as person, thing, act, event, property, contract, tort, crime and the like, to show the definitions which they impliedly received in primitive law, and to trace their presence and varied meanings in the different stages of juridicial thought. Thus, when this has been done for all the important notions involved in legal thinking, historical jurisprudence will exhibit the entire material of analytical legal thought clothed in historical garments.

Legal History.

Distinct from historical jurisprudence as we have defined it, is legal history, or the history of law. Here the aim is not so much the tracing of the development in time of abstract legal

conceptions as it is the circumstances under which and the agencies through which national systems of law have developed, or a similar consideration of the processes of growth through which specific branches of the law, or particular substantive legal rules, have passed.

If, as we have seen, the comparative method is useful in the enactment of law, the historical method is valuable in its explanation. The statement, with formal exactness, of a given principle of law may be often a comparatively easy task, while at the same time its explanation to one who has not himself followed out the preliminary logical processes by which it has been determined, is a very difficult if not impossible one. So special may be the connotations of its terms, or so bound up with other principles may be its logic, so many may be the implications and hidden qualifications which its general terms cannot express, that the real, living meaning of a given proposition of the law must almost inevitably remain undiscovered and closed to him who contents himself with a simple reading or study of its text. In such emergencies one finds himself almost instinctively turning back to an examination of the conditions under, and out of which, the doctrine in question has developed. By ascertaining the particular circumstances under which it first arose, the principle is not only revealed in its simplest form, but is interpreted by the needs which brought it into existence. By tracing its course through the years there is shown, one after another, the special facts to which it has been applied, and the corresponding extension or limitation of meaning which it has received, so that when the present time is reached the abstract statement stands completely interpreted in the history which it has lived. Thus, as the great founder of the German school of historical jurisprudence, Savigny, has declared:[3]

> "All of a science that is the product of continuous development forms an organic whole; and no portion of it can be thoroughly understood unless it is studied in connection with the rest. Thus the entire system of legal science which governs our actions can only be thoroughly mastered by historical study, going back to its first beginning

[3] HIST. ROM. LAW, V, p. 474.

> and following it into all later ramifications. Then one can use it freely for every new purpose as a means by which the freedom and effect of our own thinking will be increased and its object accomplished. Used in any other way, every mass of knowledge will only cramp and oppress our energies without our knowing it, and make us its servants where we should be its masters."

Much the same idea has been stated in the maxim, "It is history which teaches us what the law is; it is science which teaches us to use it."

In the European universities, where the teaching of the law has been so highly developed, great emphasis is laid upon the history of the law. There, it is not unusual to find much of the first year devoted to studies historical in character. If, now, Europeans find it so important that the legal neophyte should trace the development of the principles which he is to master, *a fortiori,* it would seem that we should find it so. European law of today exists very largely in codified form, and hence the art of interpreting it is very largely a formal, deductive or grammatical one. The meanings of the statutory terms of the law are determined from the *ipsissima verba* which are employed. The maxim *cessante ratione legis cessat lex ipsa* has no application. As the eminent German jurist, Puchta, himself an advocate of codification, declares in his "Introduction to Jurisprudence," "If a doctrinal [*i. e.* grammatical] interpretation is possible, the person on whom the duty of interpretation falls must abide by it, even though the result at which he may so arrive be opposed to that which notions of natural justice and morality, or of what is ambiguously called equity may seem to require." [4] In cases of patent ambiguity, resort may be had to the logic of the rule, that is, to the intention of the legislator, or it is to be discovered from the four corners of the statute, but its construction can never be made dependent upon the reason of the rule. This being so, the value of an historical knowledge of the law would seem to be greatly lessened. With us, however, the greater proportion of our legal principles are discoverable only in series of decisions of our courts, these decisions

[4] p. 46.

having authority as precedents, not as containing exact statements of the law but as elucidating the interpretations and applications of the principles which are necessarily involved in the judgments rendered. Grammatical interpretation thus has little applicability. It is not in the particular words that are used by the judge that the precedent is found, but in the *ratio decedendi* of the opinion which is declared. In general, therefore, it seems necessary for the student or lawyer to trace a principle back through the series of applications which it has received before its exact scope can be determined.

As a method of instruction of the law, the historical method has other merits to recommend it besides its interpretative efficiency. In the first place, it is especially adapted to pedagogic use in that it necessarily proceeds from the simpler to the more complex. Principles are first disclosed in their elementary form, and their subsequent refinements gradually explained. In the second place, by it the student is kept in constant contact with realities, with concrete facts, and thus his interest in the law continually maintained. Speaking of the law as a proper university study, the late Professor Thayer, addressing the American Bar Association, said:[5]

> "I set down first [in importance] this thorough historical and chronological exploration, because in this lies hidden the explanation of what is most troublesome in our law, and because in this is found the stimulus that most feeds the enthusiasm and enriches the thought and the instruction of the teacher. The dullest topics kindle when touched with the light of historical research, and the most recondite and technical fall into the order of common experience and rational thought."

More important, however, possibly than the merits which have already been pointed out, is the value of an historical study of the law in giving to the student a knowledge of the law as a living, developing force in a community. By searching out the circumstances under which its several provisions first came into being and the economic and political needs which they were

[5] "The Teaching of English Law at Universities," 9 HARV. LAW REV. 178.

intended to satisfy, by tracing their development and thus discovering how they have been so modified and interpreted as to meet new conditions and exigencies without a loss of continuity or a sacrifice of the logical or ethical principles which they express,—by these means not only is there gained a clearer insight into the law's meaning, and, therefore, a juster estimate of its rationality, but also there is revealed the inherent means of development which the law possesses, the power which its principles have of adapting themselves to the ethical, economic and political demands of new times and new conditions.

Experience has shown that the almost invariable result of a study of the law as a developing body of rules is to supply that blending of progressive and conservative elements which is always found in the mind of the wise judge and efficient legislator.

History shows that the great body of the law of any country, as having its roots often far back in the past, is closely interwoven and identified with the institutions, the thought and the life of the people; that its principles are, in fact, in most cases, the definition of the people's customary habits, and the crystallized statements of their deepest ethical ideals.

From this knowledge the doctrine is readily drawn that the fundamental provisions of one's jurisprudence are not lightly to be disturbed. The history of the law shows, indeed, that in a developing community no specific laws are to be regarded as final, and therefore not subject to alteration or annulment, but it also shows that in adapting itself to new needs, statutes must look to the past as well as to the present and future. They must modify their provisions to meet altered conditions, but they must do so in such a way as to preserve, as far as possible, such existing rights as have received the sanction of acceptance in the past, and thus to give due regard to all collateral interests that may be affected. Above all legal changes must be such as will reflect the true ethical conscience of the whole people, and not the ephemeral demands of some selfish or unenlightened class.

Philosophy of Law.

Thus far in this paper, whether dealing with practical or

analytical, with historical or comparative jurisprudence, we have had to do with actual law—with methods of determining the fundamental technical concepts which are employed, how they have developed, and the manner in which they have received substance and application in the legal systems of different countries. When, however, we enter the field of what may be called the philosophy of the law, the aim is a more fundamental one. Here the attempt is to ascertain the essential character and purpose of law as determined by the very nature of men as rational and moral beings, and by the aims and needs of civil and political society itself. We are thus brought into immediate contact with the problems of liberty and authority, of freedom of the will and determinism; and these problems in turn carry us inevitably into the realms of metaphysical inquiry. For the most part, within this field of legal philosophy, one seeks the basis upon which may be founded an ideal system of law, or at least the criteria in accordance with which the ethical validity of existing concrete laws may be tested. We thus for the most part find ourselves here moving in a sphere of ethics rather than of what we are accustomed to consider law; of final rather than of positive jurisprudence. This is a field of thought which for centuries has been diligently cultivated by Europeans, but has received comparatively slight attention in England and America.

In England, under the leadership of Bentham and his followers, the question as to the law as it should be, has taken a directly practical or utilitarian form, and the systematic study of this problem has received the name of science of legislation. Upon the Continent, the study of the law as it should be has assumed predominantly a more abstract, idealistic and, indeed, metaphysical form.

Bentham believed that, based upon an analysis of human motives and by appealing exclusively to utilitarian considerations, it is possible to state in the form of a code the complete body of law in a perfected form for any people. Were this a possible task, a science of legislation might well be possible. It would, however, be but a slaying of the slain to expose the fantastic character of this belief of Bentham. So

many are the special considerations involved—historical, racial, economic, political, social and ethical—in every question as to the best substantive principle of the law or mode of its administration, that it is now recognized to be practically beyond argument that the reform of a legal system, as a whole, is an impossible task, and that such particular changes as may be urged are to be defended, if at all, upon the special circumstances of time, place, persons and interests involved. This being so, it must seem that there is now scarcely warranted, and so far as one can predict, there will not for many years to come be warrant for, the use of the term science of legislation. There may, however, be an art of legislation in the sense of an ordered body of rules for the guidance of legislative bodies in the exercise of their law-creating powers, and in framing and formulating their enactment. Of such a character, for example, would be Ilbert's "Legislative Methods and Forms" and the Mechanics of Lawmaking," or "C. L. Jones' Statute Lawmaking."

Continental Theories of Final Jurisprudence.

The English conception of the proper province of the science of legislation is, of course, a development from the general theories of analytical jurisprudence which have exerted so powerful, one may say dominating, influence upon English jurisprudential thinking. Upon the Continent these theories have, until recent years at least, exerted little influence. Maine, writing in 1874, says of the leaders of the English school: "Bentham seems to be exclusively known in France and Germany as the author of an unpopular system of morals. Austin is apparently not known at all." [6] Reciprocally, the English writers have placed but slight value upon the juristic speculations of the French and Germans. Referring to the German writings upon *Naturrecht, Rechtslehre,* and *Rechtsphilosophie* [7] Bryce remarks that these writers "positing a few extremely general ideas or principles, develop out of them by way of deduction or

[6] Early History of Institutions, Chap. XII, p. 343.

[7] The distinction made by the Germans between *Rechtslehre* and *Rechtsphilosophie* is, to the American at least, a very vague one.

explication the rest of their doctrines down to such legal details, usually scanty, as they condescend to give. The whole system is, or seems to be, spun out of the author's fundamental conceptions. Bryce adds:

> "The general conclusion of English lawyers has been that not much can be gathered from lucubrations of this type. They are decidedly hard reading; and the harvest reaped is small in proportion to the time spent. Threading its way through, or as some would say, playing at hide and seek in, a forest of shadowy abstractions, this method keeps too far away from the field of concrete law to throw much light on the difficulties and controversies which the student of any given system encounters."

Pollock says: [8]

> "The only strictly necessary difference between our 'theory of legislation' and a German philosopher's *Naturrecht* is, that the Continental schools consider their ideal of legal institutions as a thing to be contemplated in and for itself, with a metaphysical interest which is as it were cut adrift from practice; while the Englishman's ideal is of something to be realized, or approached as near as may be, in an actual State, for actual citizens, and by the positive enactment of a legislature."

Just why there should have been this remarkable severance between English and Continental schools of jurisprudence is in some measure explainable by the differences in political development in England and upon the Continent, but more especially by the widely diverse circumstances under which the English and Continental bodies of law were developed, and the different sources from which their substantive principles were derived.[9]

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[8] Oxford Lectures, p. 15.

[9] In the paragraphs which have gone before, and in the heading to this section the term Continental theories of law has been employed. In fact, however, we might with propriety have said simply German theories of law, for the original contributions to general legal theory have in nearly every instance been made by the Teutons. By this statement it is not intended to be asserted that French, Italian and Russian writers have not been of great importance. In fact the legal literature of these countries since the be-

In order that we may understand German juristic theories of the nineteenth century it is necessary first of all to remember the manner in which German private law developed and the sources whence its substantive principles were derived; and, together with this, the individualistic character of the political and ethical speculations of the eighteenth century.

Because of the absence of strongly centralized control, Germany, and indeed European nations generally, had not been able to develop for themselves, either through the decisions of the courts or by legislation, national and unified systems of law. Instead there persisted up into the nineteenth century bodies of law composed largely of local customs, with the doctrine well established that the more local the law the greater the binding force.[10] Interfused with these local customary laws was a considerable amount of Roman law, the "reception" of which into Germany had been the work of jurists of the fifteenth, sixteenth and seventeenth centuries, trained in the civil law. This Roman law had been received into the German law of the German nations rather to supply judicial rules where customary law had failed to develop them, than to override and supplant indigenous laws. But, though this was the theory, the Roman law did appeal, because of its developed and scientific character, to those learned in its provisions, as of a higher intrinsic worth than the local customary law, and did in fact, in considerable measure, supplant that law and take to itself a higher degree of validity.

In so far as this reception of Roman law took place, it is further to be observed, there was created what may fairly be termed a common law, as well as a fundamental source of law recognized

Together with these two main sources of law as actually re-

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ginning of the nineteenth century has been of the greatest value—in not a few respects equal to and even greater than that of Germany. But, unless we except the works of a few writers such as Duguit in France or Korkunov in Russia, general theories or philosophies of law of an original and distinctive character have been the product of German thought.

[10] See article by Prof. Munroe Smith, "Customary Law," 18 POL. SCI. QUAR. 256.

ceived and applied by the courts, there was generally recognized to exist a body of natural law (*Naturrecht*) which, though not so definite and concrete, and not in fact directly controlling upon the courts and upon those exercising political authority, and therefore of what has been called "imperfect obligation," was held to be discoverable and ethically perfect and, as such, morally binding upon all. In medieval times this natural law was given a distinctly theological basis and held to be an expression of the divine legislative will. In the eighteenth century a more purely rationalistic character was ascribed to it and its precepts deduced from the nature of man. This had been the view held as early as the first quarter of the seventeenth century by Hugo Grotius, who asserted that natural law would exist and be binding even if there were no God, but it is not until the eighteenth century that the rationalistic as contrasted with the theological conception of natural law became the one generally held.

In the *Naturrechtliche* legal philosophy the reasoning was of course almost purely deductive. One after another thinker essayed with confidence the constructions of complete systems of right. With increasing emphasis it was declared that, starting with a few principles, divinely revealed, or springing from the very nature of man, it is possible to determine, *more geometrico,* all the special obligations under which men, as moral beings, rest. Locke asserts that, starting with "the idea of a Supreme Being infinite in power, goodness, and wisdom, whose workmanship we are, and on whom we depend; and the idea of ourselves as undertsanding, rational beings," "by necessary consequences as incontestable as those in mathematics, the measures of right and wrong might be made out to anyone that will apply himself with the same indifference and attention to the one as he does to the other of these sciences." Spinoza, as we know, went so far as to cast his treatise on ethics in the geometrical form of propositions, demonstrations and corollaries.

In all this speculation the dividing line between law and ethics was so indistinct as scarcely to exist. By degrees, however, the domain of legality was marked out as embracing that field of human conduct which is possible of control by the means

which society and the state can employ. It may be said, however, that quite universally the ethically legitimate sphere of this legal control was limited to the negative function of preventing wrong. Actual or positive law, as it was called, it was held, should have for its purpose the protection of those rights with which all men, *urbi et orbi,* are endowed by Great Nature conceived of as creative and volitional (*Natura Naturans*).

At the end of the eighteenth century Kant gave a new character to these *naturrechtliche* speculations. In his *Metaphysische Anfangsgründe der Rechtslehre,* published in 1796, he attempted to supply the *a priori* basis upon which any system of natural rights must rest. He pointed out that whereas in the so-called natural or physical sciences propositions may be accepted as universal only on the evidence of experience,[11] it is otherwise with moral laws. "These in contradistinction to natural laws are only valid as laws in so far as they can be rationally established *a priori* and comprehended as necessary. In fact, conceptions of judgments regarding ourselves and our conduct have not moral significance if they contain only what may be learned from experience." [12]

Starting with the individual as a rational being, and as one who is capable of having actions imputed to him, and positing freedom as a conception of pure reason, Kant accepts as the starting point of jural principles the categorical imperative—"act according to a maxim which can be accepted as a universal law." Armed with this formula and with the *a priori* principles upon which it is based, Kant finds himself able to test the ethical validity of all rules of conduct, and to construct a system of rationally founded laws.

It will not be necessary to pursue in further detail the science of right (*Jurisscientia*) elaborated by Kant. Sufficient has been said to show his conception of law. The science of right, as he conceives it, is shown to be purely abstract in character; its principles deductively obtained without any relation what-

[11] If, however the term universal is to be taken in its exact sense, these propositions, too, Kant points out, must be deduced by metaphysical methods from *a priori* principles.

[12] Hastie, transl., p. 15.

ever to concrete conditions of time and place and people. Its precepts are the product of the autonomous legislative power of the practical reason. As distinguished from the philosophy of the schoolmen, the human will is substituted for the fiat of God. As distinguished from the natural right doctrine of the eighteenth century its conclusions are founded upon principles apodictically certain. As contrasted with the theories of Rousseau and his school, reason is substituted for desire and sentiment. Man's conduct, though self-regulated, ceases to be arbitrary and lawless. It is controlled by the condition which reason itself imposes, that all conduct must be tested by a canon which may be universalized.

The exaltation by Kant of the *a priori* method in jurisprudence led before long to a reaction which developed along two fairly distinct lines: the one historical, and the other which we may describe as philosophical to distinguish it from the metaphysical methods of Kant.

Of the historical school, headed by Savigny, I have already spoken. It may, however, be here pointed out that Savigny did not wholly escape from a metaphysical conception of law, and from the attempt to define it teleologically. And, indeed, the result reached by the views held by this school of writers as to the nature of law and the means by which it came into being, was that the creation of law is placed beyond the conscious effort of men. According to their belief, the task of the wise legislator is limited to giving form and arrangement to the jural principles which the nation has by slow historical processes produced. Custom, it is held, does not create a rule of law: it is but the realization in practice of a correction antecedently present in the legal consciousness of the people.

The philosophical school of continental jurists, inaugurated by Schelling, Hegel and Fichte, and which, divided into a number of fairly distinct groups, has continued to this day, is still flourishing and has produced a voluminous literature. These writers have not abandoned the attempt to elaborate abstract and absolute systems of law, but that which especially distinguishes them from the metaphysical school is that they hold that the material from which these ethically valid legal maxims

are to be deduced is to be found, not in the pure or practical reason, but in systems of law as concretely and empirically given. In other words, though the philosophy of law remains deductive, and results in a series of abstract propositions, these are developed out of the concrete: existing rules of conduct are analyzed, in all their relations to one another and the objective conditions to which they are applied, in order to discover their essential nature and justification. As thus founding their reasoning upon actual systems of law, this philosophical school is in agreement with the English analytical school. But in ultimate aim and in mtehod of reasoning they are widely separated from the followers of Bentham and Austin. They seek a teleology of law rather than concepts upon which to base a system of purely formal jurisprudence.

A further and practically important respect in which this modern philosophical school differs from the Kantian is that the individualism of the Königsberg philosopher is abandoned. Of the manner in which this change of view was brought about by an altered conception of society and the State there is not space to speak. Nor will there be opportunity to distinguish between the various schools into which the present day continental writers on legal philosophy may be grouped. Of one writer, however, it will be necessary to say a word because his writings form a connecting link between philosophical jurisprudence and sociological jurisprudence, which last point of approach to the study of the law is one I wish more or less to emphasize. This jurist is Rudolph von Jhering. Jhering put aside the idea that the law is an agency for the realization of some abstract principle, as that of liberty, or the working out of some absolute idea, as declared by Hegel, and took his stand squarely upon the utilitarian ground that law exists for the advancement of the social welfare. The transition from the old natural rights and Kantian individualism to the social point of view is thus completed. Individual rights are defined by Jhering not as rights flowing from the freedom of the will of men as moral beings but as interests which are protected by the state, by law, because they are interests which it is of social advantage to protect; that is to say, because they are in fact, and primarily, social

interests. Jhering's definition of law as distinguished from other rules of human conduct is also interesting for the reason that, in result at least, it approximates the definition of positive law which prevails in English and American Juristic thought. Those rules of conduct he terms laws which are enforced by physical as distinguished from psychical sanctions. Inasmuch as, however, the modern state has monopolized the right to apply such sanctions, the result is that laws, legal laws properly so called, are, almost precisely, those rules which are as Blackstone says "prescribed by the supreme power in a state."

Sociological Jurisprudence.

There has always been a close alliance between political and legal philosophy, and a legal teleology such as that of Jhering fitted in with what has for some time been the dominant political doctrine as to the aim and therefore the legitimate sphere of authority of the state, and at the present time there is a body of doctrine which is entitled to the title of sociological jurisprudence. This sociological jurisprudence is closely allied to legal history and historical jurisprudence. The essential difference between them is that whereas the one is concerned primarily with the manner in which legal systems have developed in response to social and political needs and popular conceptions of justice, the other views the law as it is, seeks to ascertain in how far its substantive provisions and its modes of administration satisfy the social needs of the time, and, when a dissonance appears, aims to bring about a better adjustment. That historical jurisprudence is of the greatest aid to sociological jurisprudence is apparent, for a knowledge of circumstances under which existing laws have developed and of the needs to meet which they have been created necessarily tends to show in how far the ethical and utilitarian justification for these laws continues to exist, although it is of course to be remembered that it sometimes happens that a rule brought into existence to meet a given need may find justification upon another ground after the original basis for it has been destroyed.

The especial need in this country for a sociological conception of law is due to the undue exaltation at the hands of courts

and of jurists generally, of those juridical principles which have become embodied in our system of common law—an exaltation which has led to the creation of what Professor Pound has termed a mechanical jurisprudence, that is to say, of a jurisprudence whose claim to a scientific character is based upon a logical interconsistency of its parts, to a conformity of its special provisions to certain more fundamental doctrines of the aim and spirit of the law which, whatever may have been their original utility or conformity with current ethical conceptions, do not, in very many cases, meet present needs or satisfy present doctrines of social justice. That there should be this dissonance between certain of the doctrines of the common law and present day needs and ideals is not to be wondered at when it is remembered that the common law received most of its development under conditions which necessarily stamped it with a strongly individualistic character. But blindly to perpetuate this legal individualism either because a sacrosanct character is ascribed to ancient common law doctrines, or because a formal doctrinal consistency is the chief end to be striven for, is, of course, to elevate what Coke has called the artificial reason of the law above all the requirements of utility and justice.

It is not to be thought from what has been said that the sociological jurist would advocate a disregard of judicial precedents by our judges. It does not for a moment argue that our judges should cease to administer justice according to established law, and attempt the adjudication of cases according to their individual and personal judgment as to the equities involved. What sociological jurisprudence asks is that the judge shall not transmute a common law doctrine into absolute principles similar to those of the natural rights and metaphysical schools, and that within that sphere of discretion which, even when guided by the doctrines of *stare decisis,* every judge has, especially when called upon to determine the law with reference to new social, political and industrial conditions, he will be controlled by considerations of actual social utility, and dominant doctrines of ethical desert.

In the enactment of statute law, legislators are of course free to change existing law at will, subject only to constitu-

tional limitations. Within this field, then, there is full opportunity for the conclusions of sociological jurisprudence to be heeded. If, however, these results are to be obtained it is of course necessary that legislators and judges should become familiar with existing social and political conditions and be influenced by the result of modern social and political philosophy. And the same is true of lawyers, for it is from their ranks that the bench is recruited, and it is largely through the doctrines which they advance that judges and legislators are influenced. Professor Roscoe Pound, one of the most able of our present law writers, speaking of present unsatisfactory legal conditions, says: [13]

> "To my mind the remedy is in our law schools. It is in training the rising generation of lawyers in a social, political and legal philosophy abreast of our time. * * * If so many of the states are justified in maintaining law schools, it is because of the close connection of the lawyer with the vital machinery of our society. In view of his relation to a state wherein the most intimate problems of sociology and economics are tried in actions of trespass, * * * must not a philosophy of law founded on a sound knowledge of the elements of the social and political science of today form part,—and a necessary part—of the equipment of a trained lawyer?"

I have now finished the task which I have set myself. My aim has been, as I trust has been evident, to show how important the law is as a branch of study, and that Burke is well justified when he declares that the science of jurisprudence is "the pride of the human intellect;" as is Blackstone when he asserts that "it employs in its practice the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart;" or old Dr. Johnson when he describes it as "a study which is the last effort of human intelligence acting upon human experience."

W. W. Willoughby.

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[13] 5 COL. LAW REV. 352.